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(6)

No. 06-1613

In the Supreme Court of the United States

KHALED EL-MASRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the unavailability of information protected by the state secrets privilege requires dismissal of petitioner's suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-51a) is reported at 479 F.3d 296. The opinion of the district court (Pet. App. 1a-20a) is reported at 437 F. Supp. 2d 530.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2007. The petition for a writ of certiorari was filed on May 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner alleges that he was detained by local law enforcement officials while traveling in Macedonia, that Macedonian officials handed him over to Central Intelligence Agency (CIA) officials, and that CIA offi-

cials transported him to Afghanistan, where Afghan and CIA officials allegedly detained and interrogated him before releasing him in Albania. Pet. App. 3a-4a, 23a. Petitioner further asserts that his alleged transport, confinement, and interrogation were parts of a broader policy that involved "the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws." *Id.* at 23a (quoting complaint).

Based on those allegations, petitioner brought this damages action against former Director of Central Intelligence George J. Tenet in his individual capacity, three corporations, and various unnamed (John Doe) defendants, asserting that they had violated his rights under the Constitution and international law. Pet. App. 5a-7a, 21a-22a. Petitioner alleged that Tenet knew of and approved both the alleged policy and the specific actions alleged in the complaint, and that the unnamed Doe defendants carried out those actions. *Id.* at 5a-6a, 23a-24a. Petitioner also alleged that the defendant corporations provided an aircraft and crew to transport him to Afghanistan. *Id.* at 23a-24a.

Before the defendants filed answers or motions to dismiss, the United States filed a Statement of Interest asserting the state secrets privilege and seeking a stay of all proceedings. See Pet. App. 24a-25a. Then-CIA Director Porter Goss asserted the privilege in a public declaration and further explained the basis for the privilege in a classified declaration that was submitted to the district court ex parte and in camera. *Id.* at 52a-58a. The public declaration explained that because of the need to "protect classified intelligence sources and

methods from unauthorized disclosure and thereby avoid damage to the national security and our nation's conduct of foreign affairs," the United States "can neither confirm nor deny" petitioner's allegations. *Id.* at 54a-55a. The United States subsequently intervened and moved to dismiss the complaint on the ground that the case could not be litigated without information protected by the state secrets privilege. *Id.* at 25a.

2. The district court dismissed the case. Pet. App. 1a-20a. It determined that "there is no doubt that the state secrets privilege is validly asserted here" because the Director of the CIA personally invoked the privilege and provided "firm support" for doing so in his classified, in camera declaration. *Id.* at 11a-12a. On the public record, the court explained that petitioner's complaint "alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program," and the CIA Director's public declaration "makes pellucidly clear" that "any admission or denial of [petitioner's] allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security." *Id.* at 12a.

The district court rejected petitioner's argument that the state secrets privilege had been undermined by media coverage and public statements by government officials. Pet. App. 12a-14a. In doing so, the court emphasized "the critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case." *Id.* at 12a. Likewise, the court considered it "self-evident" that neither petitioner's complaint nor media reports,

"often relying largely on [petitioner's] allegations," could undercut the state secrets privilege because such speculative allegations "are entirely different from the official admission or denial of those allegations." *Id.* at 13a.

Having upheld the government's invocation of the state secrets privilege, the district court turned to the question whether petitioner's claims "could be fairly litigated without disclosure of the state secrets absolutely protected by the United States' privilege." Pet. App. 15a. "In the instant case," the court concluded, "this question is easily answered in the negative." *Ibid.* The court explained that "any answer to the complaint by the defendants * * * would reveal considerable detail about the CIA's highly classified overseas programs and operations." *Id.* at 15a-16a. Thus, the court concluded, "well-established and controlling legal principles require that in the present circumstances, [petitioner's] private interests must give way to the national interest in preserving state secrets." *Id.* at 17a.

3. The court of appeals unanimously affirmed. Pet. App. 21a-51a. The court explained that the state secrets doctrine permits the United States to "prevent the disclosure of information in a judicial proceeding if 'there is a reasonable danger' that such disclosure 'will expose military matters which, in the interest of national security, should not be divulged.'" *Id.* at 28a (quoting *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953)).

The court of appeals explained that, when the government invokes the state secrets privilege, a court should undertake a multilayered inquiry. Pet. App. 31a. First, the court must determine whether "the procedural requirements * * * have been satisfied." *Ibid.* Second, it must "decide whether the information sought

to be protected qualifies as privileged," which turns on whether "there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged." *Id.* at 31a, 39a. Finally, the court must determine "how the matter should proceed," which will "vary from case to case." *Id.* at 31a, 35a. As relevant here, the court explained that a "proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure." *Id.* at 39a.

The court of appeals explained that petitioner "essentially accept[ed] the legal framework described above." Pet. App. 39a. In addition, the court noted, petitioner neither disputed that the CIA Director's declaration satisfied the formal, procedural requirements for invoking the state secrets privilege, *id.* at 39a n.16, nor contended that the privilege "has no role in these proceedings," *id.* at 28a. Instead, the court explained, petitioner challenged "the [district] court's determination that state secrets are so central to this matter that any attempt at further litigation would threaten their disclosure." *Ibid.*

In rejecting that record-based contention, the court of appeals explained that "[t]he controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets," but whether the action "can be *litigated* without threatening the disclosure of such state secrets." Pet. App. 40a. The court concluded that the facts central to this action include "the roles, if any, that the defendants played in the events [petitioner] alleges," and other matters that

would "expose[] how the CIA organizes, staffs, and supervises its most sensitive intelligence operations." *Id.* at 41a. The court further determined that petitioner could not establish a prima facie case without such facts, and the defendants could not mount valid defenses without recourse to them. *Id.* at 41a-43a. The court emphasized that "virtually any conceivable response to [petitioner's] allegations would disclose privileged information," *id.* at 43a, and that "the extensive information [the classified declaration] contains is crucial to our decision in this matter." *Id.* at 48a.

The court of appeals accordingly found it unnecessary to address petitioner's argument that "publicly reported information concerning his alleged rendition is ineligible for protection under the state secrets doctrine simply because it has been published in the news media." Pet. App. 46a n.17. The court explained that, even assuming *arguendo* that petitioner were correct about the effect of such reporting, "his appeal would fail" because "the public information does not include the facts that are central to litigating his action." *Id.* at 46a & n.17.

Finally, the court of appeals rejected petitioner's argument that the case should proceed pursuant to "some procedure under which state secrets would have been revealed to him, his counsel, and the court, but withheld from the public." Pet. App. 46a. The court of appeals relied on this Court's holding in *Reynolds*, 345 U.S. at 10, that, when "the occasion for the privilege is appropriate . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." Pet. App. 46a-47a. In doing so, the court of appeals emphasized that "the state se-

crets doctrine does not represent a surrender of judicial control over access to the courts," because the Judiciary determines both whether the privilege has been properly invoked and whether a case could be fairly litigated without state secrets. *Id.* at 47a-48a.

ARGUMENT

The court of appeals correctly determined that "pursuant to the standards that [petitioner] has acknowledged as controlling, the district court did not err in dismissing his Complaint at the pleading stage," because the "central facts [underlying this action]—the CIA means and methods that form the subject matter of [petitioner's] claim—remain state secrets." Pet. App. 46a. The court of appeals' unanimous decision applying established legal principles to the highly classified facts of this case accords with the district court's conclusion after reviewing the same classified facts, and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. The basic legal principles governing this case are well established. The state secrets privilege is deeply rooted in both "the law of evidence," *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953), and the Executive's "Art. II duties" to protect "military or diplomatic secrets," *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). The government has a "compelling interest" in protecting national security information, and the responsibility to do so "falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988).

The state secrets privilege "belongs to the Government," which must assert it in a "formal claim of privilege, lodged by the head of the department which has

control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). The privilege applies when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10. While "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," *id.* at 8, the Executive's invocation of the privilege is entitled to the "utmost deference," *Nixon*, 418 U.S. at 710. Moreover, in the course of considering the Executive's privilege claim, a court must not "forc[e] a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8.

When properly invoked, the privilege is absolute: "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11. Thus, when the privilege applies, the privileged evidence is removed altogether from the case. See *id.* at 10-11. Moreover, "public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146-147 (1981) (emphasis added) (quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876)).

Accordingly, as this Court recently reaffirmed in its unanimous decision in *Tenet* v. *Doe*, 544 U.S. 1 (2005), while cases can sometimes proceed without state secrets, see *Reynolds*, 345 U.S. at 11, a case must be dismissed if a fact "central to the suit" is such a secret. *Tenet*, 544 U.S. at 9; see, *e.g.*, *Weinberger*, 454 U.S. at 146-147 (holding that environmental suit challenging

classified activity on military base must be dismissed); *Tenet*, 544 U.S. at 9 (holding that action premised on secret espionage relationship must be dismissed); *Totten*, 92 U.S. at 107 (same).

b. As the court of appeals explained, petitioner has not disputed that the CIA Director properly invoked the state secrets privilege and that "at least some information important to his claims is likely to be privileged, and thus beyond his reach." Pet. App. 28a; see *id.* at 39a n.16; Pet. C.A. Br. 8, 19 n.21. Nor did petitioner dispute in the court of appeals that a case must be dismissed at the pleading stage if its central facts are state secrets. Pet. App. 39a-40a; see Pet. C.A. Br. 8, 28. Instead, petitioner raised the fact-bound claim, which he continues to assert in this Court (Pet. 25-26), that "[t]he central facts of this case are not state secrets" because there have been public reports about some aspects of a detention and interrogation program.

That fact-bound contention is meritless and in any event does not warrant this Court's review. It is true that, at a high level of generality, the government has disclosed the CIA's participation in a program involving detention and interrogation of suspected terrorists. Pet. App. 27a-28a. But as the court of appeals explained, the facts that would be central to the adjudication of this action are not limited to any such general disclosures, but instead concern the highly classified methods and means of the program, including "the roles, if any, that the defendants played in the events [petitioner] alleges." *Id.* at 41a.

For example, "[t]o establish a prima facie case, [petitioner] would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and inter-

rogation in a manner that renders them personally liable to him." Pet. App. 41a. Significantly, "[s]uch a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations," including any espionage relationship it might have with the John Doe defendants and the defendant corporations. *Ibid.*

Moreover, most of the public reports relied on by petitioner do not vitiate the privilege even as to the matters discussed in those reports. Petitioner has correctly conceded that, because the privilege belongs to the government, only the government can waive it. Pet. C.A. Reply Br. 16. While there have been reports in the media and elsewhere about the allegations underlying this case, such media reports do not reflect the government's official view and are not necessarily accurate. Court-adjudicated confirmations or denials of those matters would harm our national security, in part because they would provide our enemies with a more reliable source of information. See, *e.g.*, *Halkin* v. *Helms*, 690 F.2d 977, 994 (D.C. Cir. 1982) (*Halkin II*); *Halkin* v. *Helms*, 598 F.2d 1, 10 (D.C. Cir. 1978) (*Halkin I*).[1]

c. Both lower courts also relied heavily on CIA Director Goss's classified declaration, which the government submitted ex parte and in camera because of its highly classified nature. The court of appeals empha-

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[1] Contrary to petitioner's contention (Pet. 26), *Ellsberg* v. *Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984), did not "reject[] [a] portion of [a] privilege claim on [the] ground that so much relevant information was already public." Instead, it remanded to the district court for further consideration of whether certain information was privileged. *Id.* at 61, 70. Here, the lower courts already considered and unanimously rejected petitioner's privilege argument. Pet. App. 12a-14a, 45a-46a & n.17.

sized that the "extensive information" in that declaration is "crucial," while the district court observed that the declaration provided "firm support" for its decision. Pet. App. 12a, 48a.

Like the lower courts' decisions, however, this public brief cannot discuss the significance of the classified information further without "forcing a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8. Upon request, the government will make the classified declaration available to the Justices of this Court under appropriate security measures. For present purposes, however, the key point is that the lower courts' application of settled legal principles to the highly classified facts of this case, and the unanimous conclusion of all four judges who considered those facts that dismissal was warranted in the circumstances, does not warrant further review. See Sup. Ct. R. 10.

2. Petitioner now categorically argues (Pet. 12, 24) that dismissal is warranted, if at all, only after the parties conduct full discovery and the court considers the claim of privilege with respect to each specific piece of evidence on an item-by-item basis. That argument was not pressed below. To the contrary, in the court of appeals, petitioner did not dispute that "dismissal at the pleading stage is appropriate if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure." Pet. App. 39a-40a; see Pet. C.A. Br. 8 (conceding that "dismissal at the pleading stage [is] permissible" when "the 'very subject matter' of a suit is a state secret"); *id.* at 28 (same).

Petitioner's newly minted contention that dismissal is never permissible at the pleading stage should be deemed forfeited. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Youakim* v. *Miller*,

425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, that contention is refuted by this Court's decisions requiring the dismissal of suits because they could not be litigated without recourse to state secrets, see *Tenet*, 544 U.S. at 9; *Weinberger*, 454 U.S. at 146-147; *Totten*, 92 U.S. at 107, as well as historical practice.[2] While petitioner now argues (Pet. 15) that *Tenet* and *Totten* require the pleading-stage dismissal only of cases involving secret espionage relationships, that is wrong. *Totten* required the pleading-stage dismissal of a suit premised on a secret espionage relationship because "[i]t may be stated as a *general principle*, that public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." 92 U.S. at 106-107 (emphases added).

In *Weinberger*, this Court followed *Totten*'s general principle in dismissing a case involving an environmental challenge to an alleged activity at a military facility—*not* a secret espionage relationship. 454 U.S. at 146-147. And in *Tenet*, this Court again reaffirmed *Totten*'s general principle, explaining that dismissal was required in both *Tenet* and *Weinberger* because "the fact that was central to the suit" was a state secret the gov-

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[2] Dismissal is hardly uncommon in state secrets litigation. The most recent and authoritative examination of the state secrets privilege concluded that, between 1973 and 2000, courts published at least 63 opinions involving the state secrets privilege, and that the complaints were dismissed as a result of the state secrets privilege in at least 23 of those cases. See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007) (forthcoming).

ernment could neither confirm nor deny. 544 U.S. at 9. The *Tenet* Court unanimously rejected the notion that the *Totten* rule was limited to "enforc[ing] the terms of espionage agreements" and underscored that it governed "*any suit* * * * the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.* at 8 (quoting *Totten*, 92 U.S. at 107) (emphasis added by the Court).

Thus, this Court's precedents make clear that, while the need to establish secret espionage agreements is a sufficient basis for dismissal, it is by no means a necessary one. Instead, as this Court's precedents establish, the dispositive question in determining when dismissal is warranted is whether a "fact that [is] central to the suit" is a state secret. *Tenet*, 544 U.S. at 9; see Pet. App. 39a. In this case, all four judges that considered that question after reviewing the classified facts answered it in the affirmative.

There is no logical basis for petitioner's assertion (Pet. 24) that cases may not be dismissed before discovery even if it is evident at the outset that they could not proceed to judgment without recourse to state secrets. As the court of appeals recognized, some state secrets cases can advance beyond the pleading stage because, in some circumstances, non-sensitive discovery may enable the parties to litigate the case. See *Reynolds*, 345 U.S. at 11; Pet. App. 35a. But regardless of whether a case falls more squarely in the *Totten* or *Reynolds* line of cases, when a court determines that the case cannot proceed to judgment without the disclosure of state secrets, further litigation is barred under settled precedent. Such litigation not only would be pointless, but would threaten the disclosure of the very privileged informa-

tion that the state secrets privilege is designed to protect.[3]

3. While petitioner asserts numerous circuit conflicts (Pet. 16-24), none of them actually exists. All of petitioner's cases apply the same basic legal principles. To the extent that they reach different outcomes, they reflect fact-bound applications of those settled principles to differing facts.

a. Petitioner argues (Pet. 22-23) that the courts of appeals are divided on the level of deference due the government's invocation of the privilege. They are not. This Court long ago settled that issue by explaining that while "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," *Reynolds*, 345 U.S. at 8, the Executive's claim is entitled to "utmost deference." *Nixon*, 418 U.S. at 710. Such deference protects the Executive's Article II responsibility to safeguard national security information, and accounts for the fact that the Executive Branch is in a far better position than the courts to evaluate the national security and diplomatic consequences of releasing sensitive information. See *ibid.*; Pet. App. 33a.

No court of appeals has questioned that standard. Petitioner quotes language from two D.C. Circuit decisions stating that courts must not merely rubber-stamp Executive decisions. Pet. 22-23 (citing *In re United States*, 872 F.2d 472, 475, cert. dismissed, 493 U.S. 960

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[3] Petitioner's contention (Pet. 11-12) that the state secrets privilege is strictly evidentiary is refuted not only by this Court's *Weinberger*, *Totten*, and *Tenet* decisions dismissing suits because they could not be litigated, but also by this Court's recognition in *Nixon* that the privilege has a constitutional dimension because it protects the President's constitutional duty to safeguard national security information. See p. 7, *supra*.

(1989); *Ellsberg* v. *Mitchell*, 709 F.2d 51, 60 (1983), cert. denied, 465 U.S. 1038 (1984)). But that recognition is fully consistent with the utmost deference standard because applying the utmost deference standard does not make the courts a rubber stamp. As the court of appeals explained, utmost deference is not absolute deference. Pet. App. 32a-33a, 47a-48a; see, *e.g.*, *Ellsberg*, 709 F.2d at 60 n.44. Indeed, *In re United States* expressly recites and follows the "utmost deference" standard, as do other D.C. Circuit decisions. See *In re United States*, 872 F.2d at 475; see also *Halkin I*, 598 F.2d at 9.

b. Petitioner also argues (Pet. 16, 23) that there is "confusion" about whether the state secrets privilege must be asserted "on an item-by-item basis with respect to particular disputed evidence," or instead can be asserted as to categories of evidence based on an affidavit of the head of the department claiming the privilege. This Court has already resolved that question as well, holding that it "will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Reynolds*, 345 U.S. at 10. Rather, "[i]t may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Ibid.* "When this is the case," the *Reynolds* Court declared, "the occasion for the privilege is appropriate, and *the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence*, even by the judge alone, in chambers." *Ibid.* (emphasis added).

In keeping with *Reynolds*, the court of appeals correctly explained that an affidavit is sufficient in some

cases, but that in others "a court may conduct an in camera examination of the actual information sought to be protected." Pet. App. 34a. In situations like this one, where a sworn declaration of the head of the department makes clear that an entire category of information is protected, there is no reason to require the government to provide further classified documents or logs to the court. Such a requirement not only would be unnecessarily burdensome for the government and the courts alike, but would pointlessly endanger national security by requiring the collection and disclosure (to the court) of more classified information than necessary—precisely what *Reynolds* rejects.

Petitioner's reliance (Pet. 23) on *Ellsberg, supra*, is unavailing because the D.C. Circuit made clear in that case that one-size-fits-all procedures are *not* appropriate, on the ground that "there is considerable variety in the situations in which a state secrets privilege may be fairly asserted." 709 F.2d at 63. In *In re United States, supra* (cited at Pet. 16), the D.C. Circuit likewise found only that an item-by-item inquiry was appropriate "on the facts of the case." 872 F.2d at 478, 479. In another case that petitioner relies on for a different proposition (Pet. 19), the D.C. Circuit specifically rejected the argument that the government had to produce a detailed privilege log instead of relying on affidavits describing the underlying state secrets concerns. *Halkin II*, 690 F.2d at 995-997; cf. *ACLU* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (cited at Pet. 23) (stating only that "a party's showing of need often compels the district court to conduct an *in camera* review of documents").

c. Petitioner similarly argues (Pet. 17-22) that the courts of appeals are divided on whether a case can ever be dismissed on state secrets grounds at the pleading

stage, or instead may be dismissed only after the parties exhaust all non-privileged discovery and the courts fully consider all non-privileged evidence. As discussed, petitioner did not argue below that pleading-stage dismissals are improper when the central facts of the case are privileged, and there is no justification for requiring further proceedings in a case once it becomes apparent that the case cannot proceed to judgment. See p. 11, *supra*. Whenever that point is reached in a particular case, dismissal is required because further proceedings would only serve pointlessly to jeopardize national security by risking the disclosure of classified information. Indeed, further discovery in such circumstances would likely be far more dangerous to national security than the in camera procedures rejected in *Reynolds*. See 345 U.S. at 10.

Accordingly, no court of appeals has held that dismissal is improper at the pleading stage when, as here, the case could not proceed to judgment without recourse to privileged information. Petitioner argues in broad terms that "[t]he central facts of this case are not state secrets." Pet. 25. But all four of the judges below who had access to the government's classified submission in this case—not to mention the top government officials whose job it is to assess and protect foreign intelligence—have disagreed with that contention.

Petitioner's reliance (Pet. 19) on *In re United States*, *supra*, is misplaced. In that case, the D.C. Circuit denied the "exceptional" remedy of mandamus because it concluded, in a decision that "largely turn[ed] on the facts of the case," that it was "unconvinced that the district court would be unable to 'disentangle' the sensitive from the nonsensitive information as the case unfolds." 872 F.2d at 479; see *Ellsberg*, 709 F.2d at 64 n.55 (cited

at Pet. 20) (requiring district court to "consider whether plaintiffs were capable of making out a *prima facie* case without the privileged information").

Petitioner's reliance (Pet. 19-20) on *Halkin II* is equally misplaced. In the *Halkin* litigation, the D.C. Circuit affirmed the district court's dismissal, at an early stage, of all claims concerning a classified surveillance program. *Halkin I*, 598 F.2d at 5. The court explained that "[n]o amount of ingenuity of counsel in putting questions on discovery can outflank the government's objection that disclosure of [a] fact is protected by privilege." *Id.* at 6-7. While discovery proceeded on challenges to a different program, that fact only underscores the contextual nature of the inquiry.

The D.C. Circuit recently confirmed that point by upholding the dismissal of claims under Federal Rule of Civil Procedure 12(b)(6) because, as in this case, the privilege precluded the plaintiff from proving the claims as to a particular defendant (an alleged CIA employee). *In re Sealed Case*, No. 04-5313, 2007 WL 2067029, at *1, *7 (June 29, 2007). *In re Sealed Case* further underscored the inherently contextual nature of the inquiry by affirming the Rule 12(b)(6) dismissal of claims against one defendant but not the other. *Ibid.*; see *id.* at *5; see also pp. 20-22, *infra* (discussing *In re Sealed Case*).

Petitioner asserts that the Fourth Circuit is on both sides of his claimed circuit split. Pet. 18, 20, 21 (citing *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *DTM Research, L.L.C.* v. *AT&T Corp.*, 245 F.3d 327, 334-335 (4th Cir. 2001)). Such an intracircuit conflict would not be a basis for the Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no intracircuit conflict here because, while peti-

tioner asserts (Pet. 18-19) that *DTM Research* "recogniz[es] the impossibility of determining at the pleading stage what evidence would be relevant and necessary to the parties' claims and defenses," that case actually holds that dismissal is appropriate where (as here) "the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." 245 F.3d at 334 (internal quotation marks and citation omitted).

Petitioner similarly appears to place a single decision, *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993), on both sides of the asserted conflict, because he puts *Bareford* not only on the side that permits pleading-stage dismissals, Pet. 18, but also on the side that requires "full presentation of all non-privileged evidence," Pet. 20. The reason that *Bareford* is not in conflict with itself is the same reason that there is no conflict at all: Instead of following rigid rules concerning the amount of discovery needed before dismissal, the Fifth Circuit, like all others, requires dismissal when it is apparent, in the context of the case, that "plaintiffs would be unable to prove their case without classified information and that the very subject matter of the trial is a state secret." 973 F.2d at 1140.

The Federal Circuit cases cited by petitioner (Pet. 19, 20) are distinguishable for the same reasons. In *Crater Corp.* v. *Lucent Techs., Inc.*, 423 F.3d 1260 (2005), cert. denied, 126 S. Ct. 2889 (2006), for example, the Federal Circuit simply remanded because it did "not believe the record in the case * * * is sufficiently developed to enable a determination as to the effect of the government's assertion of the privilege * * * in terms

of [plaintiff's] ability to assert the claims and [defendant's] ability to defend against them." *Id.* at 1268; see *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1361, 1364-1365 (Fed. Cir. 2001) (remanding for non-privileged discovery based on the facts of that case, but emphasizing that judgment for the defendant is appropriate when, "because of the Government's invocation of the state secrets privilege, the plaintiff cannot meet its burden to show that there are genuine factual issues for trial"). Here, by contrast, both the district court and the court of appeals correctly determined that state secrets are central to any attempt to litigate this case. Pet. App. 40a-43a.

d. Nor is there a conflict, as petitioner asserts (Pet. 21-22), about whether or to what extent courts must consider alternatives to dismissal before dismissing. It is common ground, and the court of appeals expressly recognized, that dismissal is required only if a case cannot be litigated without recourse to state secrets; if a case could be litigated based on other evidence without posing a reasonable danger to national security, as the D.C. Circuit thought possible in *In re United States*, 872 F.2d at 479 (cited at Pet. 22), dismissal is inappropriate. See Pet. App. 35a-36a. But here, the district court and the court of appeals correctly determined that state secrets are central to any effort to litigate the case. *Id.* at 40a-43a.[4]

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[4] *Halpern* v. *United States*, 258 F.2d 36 (2d Cir. 1958) (cited at Pet. 22), is not to the contrary. The Second Circuit held in that case that dismissal would have been required under the state secrets doctrine but for a narrow statute permitting in camera trials of patent cases. 258 F.2d at 41, 43-44. Because this is not a patent case, the reasoning of *Halpern* therefore supports dismissal under the state secrets privilege.

e. In a supplemental brief, petitioner argues that the court of appeals' decision conflicts with *In re Sealed Case, supra*. Supp. Br. 1-3. That is incorrect. Like the court of appeals in this case, the D.C. Circuit recognized in that case that dismissal is required when the very subject matter of the action is a state secret, the plaintiff could not establish a prima facie case without recourse to state secrets, or the defendant could not establish a valid defense without such information. 2007 WL 2067029, at *4, *10. Under those standards, the court upheld the Rule 12(b)(6) dismissal of claims against one defendant (an alleged CIA employee) but not the other. *Id.* at *7.

Petitioner argues (Supp. Br. 1-3) that the D.C. Circuit stated that, to require dismissal, a "valid defense" must be meritorious, not just plausible, whereas the Fourth Circuit found "hypothetical defenses" sufficient. Even if the courts of appeals disagreed about the treatment of defenses, however, any such disagreement would be irrelevant to the outcome of this case and therefore would present no genuine conflict. The Fourth Circuit upheld the dismissal of this case not only because state secrets were necessary to valid defenses, but also because the very subject matter of the action is a state secret and because petitioner could not establish a prima facie case without recourse to such secrets. See Pet. App. 40a-43a. By contrast, the D.C. Circuit expressly limited the relevant portion of its opinion to proof of defenses. 2007 WL 2067029, at *9-*10. The D.C. Circuit's opinion therefore has no bearing on two of the three alternative bases for dismissal here.

Moreover, while petitioner proclaims that this case "cannot be reconciled" (Supp. Br. 3) with *In re Sealed Case*, he neglects to mention that the D.C. Circuit itself

distinguished this case on its facts. 2007 WL 2067029, at *8. The D.C. Circuit explained that the Fourth Circuit in this case considered potential defenses in the course of determining that "state secrets are * * * central to [the] proceedings." *Ibid.* In contrast, the D.C. Circuit explained, in *In re Sealed Case*, the defendant "has already revealed his defense"—that he learned information from a third party rather than through illegal means—"and it is unprivileged," because the government did not assert the privilege over either the defendant's relevant contention or the third party's denial of that contention. *Ibid.* The D.C. Circuit also emphasized that, in *In re Sealed Case*, quite unlike this case, the CIA Director himself had conceded that at least some of the privileged and unprivileged information could be "segregated . . . at no risk to U.S. national security." *Id.* at *11 (quoting government declaration).

In concluding that the very subject matter of the case did not require dismissal as to the one defendant, the D.C. Circuit also distinguished this case. As the D.C. Circuit explained, in this case, "the Fourth Circuit dealt with sensitive details of the United States' program of extraordinary rendition for terrorism suspects and the legality of the very classified program covered by the claim of privilege." *In re Sealed Case*, 2007 WL 2067029, at *11. By contrast, in *In re Sealed Case*, the privilege was asserted over only portions of two IG reports, *id.* at *1; the plaintiff had at least some non-privileged circumstantial evidence that he argued supported his claim, *id.* at *6; the CIA Director himself acknowledged that non-privileged information could be segregated and that further litigation was possible with the segregated information, *id.* at *11; and the government

did not argue that any secret espionage relationships were implicated, *id.* at *10.

4. Because petitioner cannot show any conflict of authority, the petition boils down to a request (Pet. 27) that the Court "revisit[]" its state secrets precedents. That request is unfounded and should be denied.

a. While petitioner asserts that the Executive has asserted the privilege more often in recent years, and in different types of cases, the most recent and authoritative scholarly study concludes that "[t]he available data do * * * not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior administrations or in unprecedented substantive contexts." Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007) (forthcoming); see *ibid.* (charts identifying published state secrets decisions by year). Moreover, even if there had been an increase in the government's invocation of the privilege, that would simply reflect an increase in litigation generally, and an increase in litigation challenging classified government programs in particular. *Ibid.*

While petitioner argues (Pet. 28) that the government is now invoking the privilege in cases alleging violations of individuals' civil liberties, that is neither new nor avoidable in some circumstances. In any era, challenges to secretive intelligence-gathering programs lie at the core of the state secrets doctrine. Petitioner himself cites older cases in which the government invoked the privilege and sought dismissal in order to protect against the disclosure of the details of such activities, including where, as here, the existence of the programs was known at some level of generality. See, *e.g.*, *Halkin I*, 598 F.2d at 3; *Ellsberg*, 709 F.2d at 52-53; *In re*

United States, 872 F.2d at 473-474. And in *Tenet*, this Court unanimously held that the state secrets doctrine required dismissal of an action that included claims that the government had violated the plaintiffs' constitutional due process rights. 544 U.S. at 5. In any event, the primary point for certiorari purposes is that this Court has already laid down the governing legal principles and, as discussed above, the courts of appeals have consistently applied them to varying factual circumstances without demonstrating any need for further guidance.

b. Petitioner argues (Pet. 27-28) that, unless this Court "revisit[s]" its state secrets cases, the Executive can unilaterally foreclose judicial review of Executive actions. As the court of appeals explained, that is incorrect. Pet. App. 48a-49a. Courts review the Executive's invocation of the privilege, albeit with the requisite deference, and even when the privilege applies, dismissal is not always necessary. See pp. 14-15, *supra*. The Executive is also subject to congressional oversight and other political consequences. Although the privilege does mean that some lawsuits may not proceed, that is necessary in limited circumstances, such as this one, to protect vital state secrets.

The absence of any reason to revisit this Court's settled precedents is underscored by petitioner's proposed alternative (Pet. 29)—that when the government validly invokes the privilege to protect state secrets, the courts should "construe facts in favor of deprived litigants or shift[] burdens against the government." In other words, when a plaintiff brings a lawsuit based on an alleged secret program, the government, in petitioner's view, must either harm national security by disclosing state secrets or effectively concede the lawsuit (which could lead, among other things, to an injunction against

the alleged program). That is untenable, and fundamentally out of step with more than a century of this Court's state secrets jurisprudence.

When the government brings a criminal prosecution, it must sometimes choose between revealing classified information, in order to protect the defendant's due process rights, and "letting the defendant go free." *Reynolds*, 345 U.S. at 12. But as this Court explained in *Reynolds*, which involved an action under the Federal Torts Claims Act, the criminal analogy "has no application in a civil forum where the Government * * * is a defendant only on terms to which it has consented," and is invoking the privilege defensively. *Ibid.*; accord *In re United States*, 872 F.2d at 476.[5] Rather, "[i]t would be intolerable," and would pose grave separation-of-powers concerns, that "courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); accord *Nixon*, 418 U.S. at 710.

Ultimately, therefore, petitioner's extravagant request that this Court overrule its settled precedents in order to adopt an untenable rule of law only serves to confirm that the lower courts' unanimous application of settled legal principles to the highly classified facts of this case does not warrant further review.

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[5] In addition, the Classified Information Procedures Act, 18 U.S.C. App. 3, at 1524, on which petitioner relies (Pet. 29), applies only in criminal cases. See § 2, 18 U.S.C. App. 3, at 1524.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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